IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-610

COLUMBUS BOARD OF EDUCATION, et al.,
Petitioners,

vs.

GARY L. PENICK, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE NEIGHBORHOOD SCHOOL COORDINATING COMMITTEE AND THE NATIONAL ASSOCIATION FOR NEIGHBORHOOD SCHOOLS, AMICI CURIAE, IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

This brief is submitted pursuant to a motion filed with this Court on behalf of the Amici, the Neighborhood School Coordinating Committee ("NSCC") and the National Association for Neighborhood Schools ("NANS"), the respondents Gary L. Penick, et al., having declined to consent to its filing.

The NSCC is a local community organization located in Columbus, Ohio. Its membership approximates one thousand parents whose school children attend the Columbus public school system. The NSCC is dedicated to the realization of equal educational opportunity for all and equal protection for all citizens of the United States. In particular, the NSCC is concerned that equal educational opportunity be afforded to all citizens through a process which balances the interests of discriminatees against the legitimate expectations and aspirations of innocent third parties subject to school desegregation decrees.

The NANS is a nationally prominent organization founded in August of 1976. Its membership approximates four hundred thousand individuals associated with locally based affiliated organizations. Its stated purpose is to educate the public with respect to the benefits to be served through heightened recognition of the neighborhood school concept.

QUESTIONS ADDRESSED

1. Whether a federal court may presume, on the basis of those considerations set forth in *Brown* v. *Board of Education of Topeka, Kansas,* 347 U.S. 483 (1954), that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution was violated as a result of a finding that local school authorities intentionally maintained and created a racially imbalanced school system, in the absence of any attempt to quantify the harm which may have resulted as a direct result thereof, and, specifically, with respect to whether the quality of the educational opportunity afforded a child assigned to a racially imbalanced school was inferior to that afforded other children in the community and whether the students who were required to attend the racially imbalanced

school were deprived of more important social contacts than the children in other schools.

2. Whether the imposition of a systemwide remedy, requiring the statistical balancing of all schools within a residentially segregated urban school district, exceeds the jurisdiction of a federal court where the court has failed to determine whether such remedy creates a totally reflective and realistic equilibrium between the remedial interests of discriminatees and the legitimate expectations of parents and students thereof, to be free from the disruption and dislocation of constitutent elements of a community, which occurs as a result of, *inter alios,* extensive student transportation decrees which intrude upon fundamental constitutional rights of liberty and privacy.

ARGUMENT

I. THE DECISIONS BELOW FAILED TO DETERMINE WHETHER, ON THE BASIS OF POST-1954 CONSIDERATIONS, THE CHALLENGED PRACTICE WAS HARMFUL AND WHETHER IT WAS SUFFICIENTLY HARMFUL TO JUSTIFY THE DRASTIC REMEDY IMPOSED TO ELIMINATE THE HARM.

All remedial school desegregation decrees have sought to implement the Equal Protection Clause through a process of vindication, *viz.,* to vindicate the found constitutional violation at any cost. In school desegregation cases, where the full mélange of racial, social-community and educational interests are at stake, courts must not only care-

fully scrutinize whether the practice being challenged is harmful but also whether it is sufficiently harmful to justify the costs of eliminating it.

In *Brown* v. *Board of Education of Topeka Kansas,* 347 U.S. 483 (1954), this Court held that student assignments based upon race were unconstitutional and ordered that this practice be eliminated. In so holding, this Court relied heavily upon the evidence tendered by social scientists, *id.* at 494 n. 11, in order to quantify the harm that resulted from racially based student assignment policies that had as their declared purpose the separation of the races. As this court stated:

> "To separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Id.* at 494.

Since the conclusion of the social scientists was that forced segregation was psychologically detrimental, *id.* at 495 n. 11, the obvious remedial action was to abolish separate schools for Black and White children by requiring the creation of a school system that was racially balanced. It is from this holding that the alleged benefits of desegregation, or, integration of the races arose, and from which the highly controversial school desegregation decrees have issued.

This Court has recognized that a member of a minority group that has been discriminated against does not automatically qualify as a "victim of discrimination" simply by virtue of his race. Rather, in *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 363-364 (1977), this Court emphasized that each individual requesting relief must prove that he or she has *actually* suffered discrimination. *See also Dayton Board of Education* v. *Brinkman,* 433 U.S. 406, 420 (1977).

Relying on the holding of *Brown, supra,* lower federal courts, after having determined that local school officials undertook to intentionally create and maintain a dual school system based on race, have concluded, *ipso facto,* that such actions constitute sufficient harm to the discriminatees so as to justify the imposition of judicially imposed sanctions. Absent from this process of presumptive analysis is the albeit difficult but necessary task of subjecting to strict judicial scrutiny the issue of whether the conduct complained of was in fact harmful. For it is only after such an analysis has been undertaken that a court can realistically determine the manner, method and means by which to eradicate the harm.

Upon examination of what desegregation is designed to achieve, one can quantify the harm which must be found in order to predicate a remedial order which creates a totally reflective and realistic equilibrium between the interests of discriminatees and the legitimate expections of innocent third parties.

Social scientists in the 1950's opined that desegregation would provide Black children with:

> "[A] greater sense of personal dignity; a rise in personal ambition; a greater confidence and respect for their own sub-group . . . Negro youths are likely to attain higher standards of academic proficiency and exert their capacities more fully after desegregation, because of increased morale, decreased self-hatred, and a fuller sense of sharing the American Dream". St. John, SCHOOL DESEGREGATION OUTCOMES FOR CHILDREN 43 (1975).

Social scientists also believed that desegregation would in-

crease the educational achievement of Black children merely because White schools had greater educational resources. Lines, *Race and Learning: A Perspective on Research,* 11 INEQUALITY IN EDUC. 26 (1972). Still another basis for integrating schools was the "contact theory", which premised that greater contact between the races would result in greater considerations of mutual understandings and tolerance of cultural differences. Armor, *The Evidence on Busing,* IN THE GREAT SCHOOL BUS CONTROVERSY 84-85 (N. Mills ed. 1973).

Segregation, therefore, was deemed harmful because it stigmatized Blacks, deprived Blacks of valuable contacts with the so-called dominant group, thereby perpetuating their subordinate position, and because segregation had the inevitable effect of reducing the financial and educational resources available to all Black students because their schools were attended only by members of the least dominant group.

Since *Brown I, supra,* a plethora of studies have surfaced which have measured the remedial effects of school desegregation decrees. One survey reached four disparate conclusions: (1) racial integration results in an increase in the school performance of minority youth; (2) racial integration has a mixed effect on minority students; (3) racial integration has no effect on the academic achievement of minority students; and (4) racial integration has negative effects on the scholastic achievement of minority students. Weinberg, *The Relationship Between School Desegregation and Academic Achievement: A Review of the Research,* 39 LAW & CONTEMP PROB. 241, 243 (1975). Still other surveys of similar studies on desegregation and academic achievement state that, over half of the studies conducted have found that no significant difference in educational achievement between segregated and desegregated Black children exists.[1] St. John, *supra,* at 39. *See,* Kiesling, *The Value to Society of Integrated Education and Compensatory Education,* 61 GEO. L. J. 857 (1973).

Likewise, Professor Owen M. Fiss, in his article entitled: *The Jurisprudence Of Busing,* 39 LAW & CONTEMP. PROB. 195, 201-204 (1975), has observed that: (1) there is no longer a consensus in the relevant academic professions as to the harmfulness of segregation. This is due in part to the growing disbelief in the validity of the proposition that social betterment derives from governmental intervention; (2) one wonders whether segregation is *that* harmful or harmful at all where the remedies imposed consume fiscal resources of the community, expose children to safety hazards, reduces the time available for classes, and loses whatever psychological or emotional advantages which might arise from having all the children in a neighborhood attend the school identified with that neighborhood; and (3) there is no longer a consensus in the Black community that segregation is harmful. Some Blacks have raised their voices against integration because of its conflict with the ideal of self-determination. Others are concerned with having to suffer the burdens of busing. Still others are offended by the racist implication that Blacks will learn better when they are in a setting dominated by Whites. And others are concerned with the use of financial resources for busing when such resources can be used for more traditional academic purposes.

---

[1] *See also,* the 1972 statement made by Roy Innis, then Director of the Congress of Racial Equality, that school integration is a "bankrupt, suicidal method . . . based on the false notion that Black children are unable to learn unless they are in the same setting as White children." N.Y. TIMES, Mar. 13, 1972, at 30, Col. 4.

Professor James S. Coleman who, pursuant to Section 402 of the Civil Rights Act of 1964, 42 U.S.C. § 2000-1 (1970), was requested to determine the extent that equal educational opportunity was not available to various racial groups in the United States' public educational institutions, first determined that integration would bring about achievement benefits not available in a segregative setting; however, in a later report prepared by Mr. Coleman entitled: SCHOOL DESEGREGATION AND CITY-SUBURBAN RELATIONS (1978), Mr. Coleman rejected the foregoing conclusion.

First, Mr. Coleman rejects the proposition that the elimination of *de jure* school segregation would, *pari passu*, eliminate racial segregation in the schools. This is supported by studies demonstrating the white exodus to the suburbs which has produced a situation where most large urban school systems are majority black, while the surrounding suburban areas are predominately white. *See also* Armor, WHITE FLIGHT, DEMOGRAPHIC TRANSITION, AND THE FUTURE OF SCHOOL DESEGREGATION, as presented at the meeting of the American Sociological Association, San Francisco, September, 1978.

Second, Mr. Coleman rejects the assumption that integration would automatically improve the achievement of lower class Black children. Citing the Pasadena and Riverside, California desegregation experiences, Mr. Coleman points out that the studies show either no achievement effects, or else losses. *See also* Stephen, Walter G., *School Desegregation: An Evaluation of Predictions Made in Brown* v. *Board of Education*, PSYCH. BULL (1978), Vol. 85, No. 2, 217-288.

Finally, Mr. Coleman concludes:

> "A review of the large number of analyses of effects of desegregation on achievement has recently been carried out, showing no overall gains. In some cases, there seem to be slight gains, in others no effects, in still others losses in achievement. Some of the most carefully studied cases, over a period of years following desegregation, such as in Pasadena and Riverside, California, show either no achievement effects, or else losses. Thus, what once appeared to be fact is now known to be fiction. It is not the case that school desegregation, as it has been carried out in American schools generally brings achievement to disadvantaged children. It is probably true that desegregation under optimal conditions will increase achievement of disadvantaged children. But that is not the point: very likely any school changes, under optimal conditions, will have this effect. What we must look for is the effect that occurs under the variety of actual conditions in which desegregation is carried out.
>
> The implication of this recognition of the actual effects of desegregation on achievement is that no longer should we look solely, or even primarily, to racial balance in the schools as a solution to inequality of educational opportunity. That inequality of opportunity is not something to be easily overcome. If we are looking for policies to help bring about equality of educational opportunity, it is necessary to look more broadly."

The Amici do not suggest for one moment that this Court's decision in *Brown I, supra,* was in error, or, that the pernicious holdings of *Plessy* v. *Ferguson,* 163 U.S. 537 (1896), and *Dred Scott* v. *Sanford,* 60 U.S. (19 How.) 393 (1856), should be reinstated. Rather, Amici submit that, the foregoing studies and surveys mandate that a court's analysis should not cease after it has determined that the actions of local school authorities were motivated by some degree of discriminatory *animus.* Courts should and must be required to take the next step of subjecting to strict

judicial scrutiny the effects that such conduct had on those claiming to have been harmed by same. It is only after this critical analytical step has been taken, may a court determine the true nature of the remedy to be developed.

In this case, the district court held that "Each black school child in Columbus must have the opportunity for the integrated education and attendant educational advantages contemplated by *Brown I, supra,* and the cases which have followed." *Penick* v. *The Columbus Board of Education,* 429 F. Supp. 229, 267 (S.D. Ohio, 1977). Yet, the district court failed to determine whether the conduct of the local authorities was intentionally motivated for the purpose of stigmatizing Black children – and whether, in point of fact, Black children were stigmatized as a result of the alleged conduct; whether such conduct had the effect of depriving Black children of contacts with White children, so as to cause them to suffer psychological or emotional harm; and whether the Black children suffered disparity of educational opportunity in that local school authorities intentionally sought to make both financial and educational resources available to White children on more favorable, or, disproportionate terms. This Court, however, has never excused private parties from the requirement of establishing injuries to their own legally cognizable rights. *See, e.g., Warth* v. *Selden,* 422 U.S. 490, 495 (1975).

Notwithstanding the failure of the district court to quantify the harm which flowed from the found intentional acts of the local school authorities, the district court proceeded to impose a drastic remedy – the stated purpose being to ". . . enhance the quality of education in Columbus – that will not only encumber petitoners' educational and administrative responsibilities but will intrude upon the duly recognized liberty and privacy interests of both Black and

White children. For, as here, the desegregation remedy ordered by the district court requires that: *every* school in the system be racially balanced to within ± 15% of the system's overall racial composition; the implementation thereof will involve the dislocation of over 42,000 children from their neighborhood schools; extensive cross-town transportation be implemented for 37,000 students on 213 buses (to be accomplished, six different school starting times must be scheduled so that each bus can make an average of six trips each day); and that the grade structures of nearly every elementary school be altered.

Amici submit that the imposition of such a drastic remedy, in the absence of any determination of the nature and extent of the harm suffered, or, as to whether such a remedy will, in fact, enhance educational opportunities, *ibid,* and integrated experiences, creates the anomalous situation where the imposition of a remedy – which should be designed to achieve a truely reflective and realistic vindication of the harm – is based not upon quantifiable standards, *supra,* but, rather, upon judicial guesswork. In an area as sensitive as this, Amici submit that such an approach is ill-conceived and unwarranted.

While this Court's opinion in *Dayton Board of Education, supra,* requires a district court to "determine how much incremental segregative effect these violations had on the racial distribution of the . . . school population as presently constituted . . ." *id* at 402, it implicitly sanctions lower federal courts to assume that the harm specified in *Brown I, supra,* as resulting from assignments of students on the basis of race, is the identical harm which results from post-1954 conduct of local school officials in which student attendance is segregated, not because students have been specifically assigned to schools on the basis of race but on the basis of geographic proximity. Without re-

quiring the lower federal courts to specifically determine whether the latter produces any harm, or, no harm at all, the remedial action to be taken will never be truly reflective of the harm.

If the enhancement of equality of educational opportunity is the avowed purpose of school desegregation cases, and equality of educational opportunity can be abstracted from the Equal Protection Clause, as we believe it can, it is imperative, then, that the lower federal courts be required to reject the use of analytical presumptions, based upon pre-1954 considerations, as the sole predicate for concluding that a constitutional violation has occurred. Rather, a return to the basic and direct fact-finding process is critically necessary in order to confront, head on, the issue of whether the conduct of local school authorities was in fact harmful. Once having quantified the harm, the lower federal courts can then go about the business of realistically determining whether the remedial action to be taken not only fits the harm, but whether it will truly eradicate it.

II. THE LOWER FEDERAL COURTS, IN APPROVING THE DESEGREGATION PLAN AT ISSUE, FAILED TO DETERMINE WHETHER SUCH A PLAN CREATED A TOTALLY REFLECTIVE EQUILIBRIUM BETWEEN THE REMEDIAL INTERESTS OF DISCRIMINATEES AND THE LEGITIMATE EXPECTATIONS OF PARENTS AND STUDENTS THEREOF.

In cases where this Court has been presented with instances of actional past race discrimination, the Court has addressed the difficult issues that arise in the fashioning of proper remedies. In such cases the Court has consistently held that every effort should be made to put identifiable victims of discrimination in the position they would have been in but for the discrimination. *See,* e.g., *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 418 (1975); *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 772-773 (1976). This Court has also required that the scope of the remedy must be tailored to fit the nature and extent of the violation proved. When the disparity between the violation found and the relief granted becomes too great, the remedy must be rejected, as it was in *Dayton,* 433 U.S. 419. Furthermore, in considering what constitutes proper and realistic relief, there is an affirmative obligation to determine whether the legitimate expectations of innocent third parties would be imperiled by a proposed remedy. If so, there must be undertaken the delicate task of balancing the interests at stake.

Amici submit that the lower courts in the case at bar have ignored these fundamental principles. In approving the desegregation plan at issue, the lower federal courts failed to create a totally reflective and realistic equilibrium between the remedial interests of discriminatees and the

legitimate expectations of parents and students thereof to be free from the disruption and dislocation of constituent elements of a community, which occurs as a result of extensive student transportation decrees which, as here, intrude upon fundamental rights of liberty and privacy. *See Keyes* v. *School District No. 1,* 413 U.S. 189 (1973); *Regents of the University of California* v. *Bakke,* 98 S.Ct. 2732, 2787 N. 41 (1978).

The crucial starting point for consideration of whether a court induced desegregation plan can realistically achieve its stated purpose, is the ability of the lower federal courts to gauge the response of those to be directly affected by it. For such a plan's effectiveness is totally dependent upon the willingness of those affected by it to adhere to same.

It is beyond cavil that, judicially induced desegregation plans not only intrude upon the "local autonomy" of school districts, *Dayton,* 433 U.S. 410, but encroach upon important "community aspirations and personal rights." *Keyes,* 413 U.S. 243. The consumption of sparse financial resources for the purpose of implementing the plan, and the extraction of students from their neighborhood schools, has and will continue to cause rejection of school operating levies, White-flight, racial tensions, and a breakdown in a community's support for its educational institutions.

There are some who will argue that those who reject court-induced desegregation plans harbor latent forms of prejudice and bigotry. Those same individuals will argue that integregation should occur at any cost. Amici reject such generalized propositions. A school desegregation plan affects the entire community, both Black and White children alike; accordingly, it is imperative that a district court, before adopting any plan, be required to determine not only whether the plan is tailored to the harm but whether

the plan can realistically achieve its stated goals without intruding upon the rights and expectations of those who will be directly affected by it.

In *Keyes,* 413 U.S. 251, Justice Powell stated:

> "We have strayed, quite far as I view it, from the rationale of Brown I and II, as reiterated in Swann, that courts in fashioning remedies must be 'guided by equitable principles which include the adjusting and reconciling [of] public and private needs, Brown II, 349 U.S. at 300, 99 L. Ed. 2d. 1083'.
>
> I urge a return to this rationale. This would result, as emphasized above, in no prohibition on court-ordered student transportation in furtherance of desegregation. But it would require that the legitimate community interests in neighborhood school systems be accorded far greater respect."

Amici submit that while it is important that a remedy be tailored to fit the harm, *Dayton,* 433 U.S. at 420, it is equally important that the remedy be subjected to strict judicial scrutiny with respect to whether it will prejudice those innocent parties who did not participate in any constitutional violation and whether it is, in fact, the most efficacious remedy for eradicating the harm.

District courts should require the parties to present evidence relating to the psychological and social ramifications of any plan submitted to it. Clearly, if such evidence is deemed relevant in relation to the issue of whether segregation is harmful, it should be equally relevant to the issue of whether the plan as proposed will impose unwarranted harm on those subject to its edict. Moreover, studies and surveys such as those referred to herein should be considered in order to determine the efficacy of alternative methods of remedial action; *viz,* freedom-

of-choice plans; inter-district voluntary transfers; vouchers for education; incentives for attendance at integrated schools; and the concept of voluntary regional integrated schools. *See, e.g.,* Calkins & Gorwar, *The Right to Choose an Integrated Education: Voluntary Regional Integrated Schools — A Partial Remedy for DeFacto Segregation,* 9 HARV. C.R. — C.L.L. REV. 171 (1974).

In the case at bar, the district court imposed a remedial order which will, in the words of Justice Rehnquist, impose ". . . severe burdens . . . on the Columbus School system and the Columbus community in general . . ." *Columbus Board of Education, et al.* v. *Penick, et al.,* — U.S. —, 58 L. Ed. 2d 55, 59. Amici agree with Justice Rehnquist's assessment. The proposed reassignment of 42,000 students, 37,000 of which will be transported by bus away from their neighborhood schools, has already caused a rejection of three (3) non-school renewal levies (November 1976, November 1977, and June 1978), White-flight, and a significant decrease in student enrollment. Some middle ground must be found which will counter these adverse consequences and, at the same time, achieve the vindication of the constitutional violations so found. To "let the buses roll," and to create community and parental uncertainty through the breakdown of community aspirations, without any consideration of the effects, is error.

One alternative is to abandon court ordered desegregation plans and let school desegregation occur naturally through community changes in residential housing patterns and practices. In view of the absence of findings which demonstrate definitive and meaningful educational and social benefits from court ordered desegregation plans (Armor, *supra,* and St. John, *supra*) this alternative, if properly structured by local school authorities acting under specific judicial reference guidelines, may hold some validity.

A second alternative is that of an inter-district freedom-of-choice plan. Under this procedure, as suggested by Professor Coleman, families can make their choice of schools independently of their choice of residence, with reasonable transportation expenses provided. State funds would necessarily follow the child so as not to increase the financial burden upon the receiving district.

A third alternative offered by Professor Coleman is the "Vouchers for Education" plan:

> "Perhaps the simplest, cleanest, and most straightforward way to provide equal educational opportunity, independent of race, residence, or wealth, is to give every child a voucher or entitlement, to be used in any accredited school, public or private. Such a plan, which has recently been proposed in Michigan as well as in other states, does not immediately exhibit its potential for encouragement of school integration. But that potential can be quickly realized if the vouchers are worth more in integrated schools. This means that integrated schools would have somewhat higher expenditures, a somewhat richer program, than non-integrated schools . . . No one is excluded, by reason of race or any other attribute — except his preference for a segregated school. If he chooses such a school, he pays in the form of a somewhat less rich educational program." Coleman, *supra,* at 14.

The foregoing are not all inclusive; many variations on the theme can and should be developed in order to meet Justice Powell's admonition that courts should return to the rationale that the ". . . fashioning [of] remedies . . . be guided by equitable principles which include the adjusting and reconciling [of] public and private needs." *Keyes,* 413 U.S. 189, 251.

Amici submit that the desegregation plan, as ordered by the district court, failed to heed Justice Powell's admoni-

tion. For the Plan as ordered fails to create a totally reflective and realistic equilibrium between the legitimate expectations of the discriminatees and the rights of innocent parties who played no role in the violations so found. The plan, as ordered, should be rejected as having been the product of excessive judicial action.

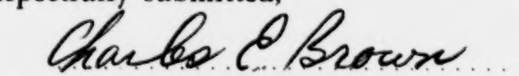
In conclusion, Amici submit that specific remedial guidelines are necessary in order to provide lower federal courts with a proper frame of reference from which they may determine not only whether a desegregation plan is tailored to the violation, but whether the plan is realistic and effective. For example, historical educational constructs (*e.g.*, the neighborhood school concept) should be isolated and subjected to careful scrutiny with respect to whether their continued viability can be sustained. If they cannot, school authorities should be charged with the responsibility of developing a plan which either utilizes these constructs in a constitutionally permissible manner, or, which gradually replaces the same with realistic educational substitutes, designed to meet the educational aspirations and needs of the community. Moreover, surveys and studies of the local community should be prepared for the purpose of determining whether sufficient financial resources will be available to enhance the quality of equal educational opportunity and in order to determine the make-up of the school system when a plan is implemented. If it is determined that sufficient financial resources may not be available, courts must be required to determine whether the inability to provide enhanced educational opportunity is outweighed by the need for an immediate eradication of the harm so found.

If reasonable minds prevail, none of the foregoing suggestions should be the subject of vigorous opposition.

CONCLUSION

For those reasons advanced herein, Amici respectfully urge that the judgment of the United States Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,



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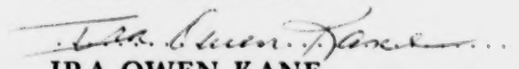

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PROOF OF SERVICE

This is to certify that three copies of this brief amici curiae have been served upon all counsel of record in this case, pursuant to Rule 33, Rules of the Supreme Court of the United States, on this 21 day of February, 1979.

Ira Owen Kane

IRA OWEN KANE